

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>89-11664</u>
JOE RABUN)	
)	
Debtor)	at 10 O'clock & 45 min. A.M.
)	Date: 9-12-90
CROCHET EQUIPMENT CO., INC.)	
)	
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>90-1015</u>
JOE RABUN)	
)	
Defendant)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This is a proceeding arising under Title 11 United States Code. This court has original jurisdiction pursuant to 28 U.S.C. §1334(b) as a core proceeding under 28 U.S.C. §157(b)(2)(I). No party has objected to the exercise of jurisdiction by the Bankruptcy Judge.

Crochet Equipment Company, Inc. (hereinafter "Crochet"), plaintiff, has brought this adversary proceeding seeking a determination of nondischargeability of a debt from Joe Rabun, defendant in this proceeding and debtor in the underlying Chapter 7 bankruptcy proceeding (hereinafter "debtor").

The debt is

represented by a consent judgment obtained in Crochet Equipment Company Inc. v. Rabun & Company, Inc. and Joe L. Rabun, Civil Action File No. 86-458"B", United States District Court for the Middle District of Louisiana dated July 27, 1987. A certified copy of the judgment was admitted into evidence in this proceeding as P-1. The parties have stipulated that Fifty-Six Thousand Six Hundred Sixty-Six and 67/100

(\$56,666.67) Dollars was the balance due under the judgment as of the date of the debtor's filing for relief under Chapter 7 of Title 11 United States Code. The Louisiana District Court complaint was based upon allegations of unfair competition and theft of trade secrets. A certified copy of the complaint was admitted into evidence as P-2.

Crochet is engaged in the business of manufacturing a waste incinerating unit identified as the "Pactherm Pit Burner" (hereinafter "pit burner"). In January, 1986 a pit burner was under construction in Albertville, Alabama. During the construction process, debtor visited the construction site and photographed the pit burner. Subsequent to the debtor's visit to the Albertville, Alabama construction site, debtor produced and distributed a brochure marketing the "Rabun Pit Burner" in direct competition with Crochet. The brochure incorporated the photographs of the pit burner taken by the debtor at the Albertville site. The debtor began bidding against Crochet for the sale and construction of pit burner units of substantially similar design as that marketed by Crochet. The pit burner manufactured and marketed by Crochet is not patented nor patentable. Prior to the printing and distribution of the brochure, the debtor obtained advice of counsel that debtor's use of the photographs of Crochet's pit burner in debtor's brochure was not a violation of any applicable law.¹

The Louisiana District Court complaint was based upon allegations that the debtor without permission took pictures of the Albertville pit burner during construction. During construction the debtor allegedly learned certain trade secrets applicable to the pit burner. According to the complaint, the unlawfully appropriated trade secrets were incorporated into the design and construction of the debtor's competing pit burner. The final consent judgment entered in the Louisiana District Court proceeding, made no findings of fact.

¹The counsel rendering this advice was not the attorney representing the debtor in the underlying Chapter 7 bankruptcy proceeding and this adversary proceeding.

Crochet contends that the consent judgment entered in the district court case and the other facts presented at this trial establishes that the stipulated debt should be determined as nondischargeable pursuant to 11 U.S.C. §523(a)(6)².

Initially, this court must determine whether, based upon the Louisiana District Court consent judgment, the debtor is collaterally estopped from disputing the nondischargeability of the debt. The consent judgment has no collateral estoppel effect on the debtor's right to contest the issue of dischargeability. The standard for applying collateral estoppel to prevent relitigation of the facts already litigated is tripartite.

1. The issue at stake in the present litigation must be identical to the one in the prior litigation;
2. The issue must have been actually litigated in the prior case; and
3. The determination of the issue must have been a critical and necessary part of the judgment in the earlier action.

In re: Halpern, 810 F.2d 1061, 1064 (11th Cir. 1987); In re: Heid, 734 F.2d 628, 629 (11th Cir. 1984); In re: Stover, 88 B.R. 479, 481 (Bankr. S.D. Ga. 1988).

Consent judgments may satisfy the three requirements for collateral estoppel. In re: Halpern, supra. However, the party pleading collateral estoppel must prove from the record of the prior litigation or through extrinsic evidence that the parties intended the consent judgment to operate as a final adjudication of the issue. Balbierer v. Austin 790 F.2d 1524, 1528

²11 U.S.C. §523(a)(6) provides in pertinent part:

(a) A discharge under §727 . . . of this title [11] does not discharge an individual debtor from any debt

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

At trial Crochet abandoned an alleged ground for recovery under 11 U.S.C. §523(a)(2)(A).

(11th Cir. 1986). In this case, the consent judgment failed to make any findings of fact. At trial Crochet failed to introduce any extrinsic evidence to support a contention that the parties entering into the consent judgment intended that consent judgment to operate as a final determination that the complained of conduct of the debtor constituted a willful and malicious injury to Crochet or to Crochet's property interest.

From the facts presented at trial Crochet has failed to prove that the conduct of the debtor constituted willful and malicious conduct injuring Crochet. The Court of Appeals has summarized the standards to be applied by this court in reaching a determination of dischargeability of debt under §523(a)(6).

The standard of 'willful and malicious injury' under the discharge provision requires . . . a showing of an intentional or deliberate act, which is not done merely in reckless disregard of the rights of another. As to the 'malicious' prong, we have defined that term as used in §523 as 'wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill will.' In re: Latch, 820 F.2d at 1166 n. 4 (citation omitted). We further refined that definition in . . . [Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257 (11th Cir. 1988)]. As we held there, 'malicious for purposes of section 523(a)(6) can be established by a finding of implied or constructive malice' [Chrysler Credit Corp. supra at 1263.] Special malice need not be proved, i.e., a showing of specific intent to harm another is not necessary. Id. Constructive or implied malice can be found if the nature of the act itself implies a sufficient degree of malice. See, United Bank of Southgate v. Nelson, 35 B.R. 766, 769 (N.D. Ill. 1983) (quoting Tinker v. Colwell, 193 U.S. 473, 24 S.Ct. 505 48 L.Ed. 754 (1904)).

Lee v Ikner (In re: Ikner) 883 F.2d 986, 991 (11th Cir. 1989).

The standard of proof required in establishing a willful and malicious injury is by clear and convincing evidence. See, Ikner supra at 991; In re: Hunter 780 F.2d 1577, 1579 (11th Cir. 1986).

The Louisiana District Court complaint asserted a cause of action based upon a claim of theft of trade secrets and a claim of unfair competition based upon the use of those stolen secrets. The consent judgment makes no findings of fact. At trial in this adversary proceeding Crochet failed to put forth any evidence of the theft of any trade secret. At best, the evidence establishes that the action of the debtor in using photographs of Crochet's pit burner in the debtor's brochures

advertising his pit burner may constitute a deceptive trade practice.³ The un rebutted testimony of the debtor is that following his photographing the pit burner in Albertville, Alabama, he inquired and received an opinion from his attorney that as the pit burner was not patented, and the use of the photographs in the debtor's brochures was not in violation of any applicable law. The debtor in good faith relied upon this representation in producing and distributing his brochure. The

subjective good faith of the debtor and his reliance upon his then attorney's opinion is sufficient to exclude a finding of willful and malicious conduct within the meaning of §523(a)(6). McClernon v. Bitterman (In re: Bitterman) 24 B.R. 68, 69 (Bankr. W.D. Mo. 1982). This good faith reliance upon an attorney's representation is sufficient to prevent a finding by clear and convincing evidence of either special, implied or constructive malice. The debt due Crochet is covered by the discharge issued to the debtor.

It is therefore ORDERED that judgment is entered for defendant Joe Rabun, debtor, against plaintiff, Crochet Equipment Company, Inc. No monetary damages are awarded.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 12th day of September, 1990.

³A determination of which state law to apply in establishing a deceptive trade practice is unnecessary for determination of dischargeability. Assuming that the facts alleged are sufficient to establish a deceptive trade practice by a preponderance of the evidence under whichever state law might prove applicable, the conduct of the debtor does not establish nondischargeability.